Supreme Court of the United States

October Term, 1979

No. 79-358

MICHAEL SWIHART,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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OPINIONS BELOW

The Supreme Court of the State of Ohio has issued a ruling in this case which has not been reported. The journal entry of the Supreme Court of the State of Ohio is included in the Appendix (page A1), as are the unreported journal entry and opinion of the Court of Appeals, Ninth Judicial District of Ohio (Appendix page A2). ruling below

JURISDICTION

The judgment of the Supreme Court of Ohio was entered May 25, 1979 (Appendix, page A1). No petition for rehearing was filed. The jurisdiction of the Supreme Court is invoked pursuant to this Court's ability to review and decide any title, right, privilege or immunity specially established or claimed under the Constitution of the United

States. 23 U.S.C. §1257 (3). This Petition for Writ of Certiorari has been filed within ninety days of the journal entry of the Supreme Court of Ohio dated May 25, 1979.

QUESTIONS PRESENTED

I. Whether the denial of a continuance for the purpose of securing an expert witness essential to establish the Petitioner's plea of not guilty by reason of insanity precluded the Petitioner from preparing and presenting an adequate defense and, therefore, violated the Petitioner's due process rights guaranteed under the Fourteenth Amendment of the United States Constitution.

II. Whether the trial court's finding that the Petitioner was sane and legally responsible for the killing of his mother, Susan Swihart; his brother, Brian Swihart; and setting his family's house on fire; when such verdict was against the manifest weight of the evidence and where there was uncontradicted evidence clearly indicating that the Petitioner was incapable of refraining from his acts, violated the Petitioner's due process rights guaranteed under the Fourteenth Amendment of the United States Constitution.

III. Whether the trial court's verdict that Petitioner was guilty of the aggravated murder of Russell Swihart, when such verdict was against the weight of the evidence, first because the evidence presented respecting Petitioner's insanity could not support a conviction, and second, because the evidence failed to show that Petitioner acted with prior calculation and design as charged in the indictment violated the Petitioner's due process rights.

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

This case also involved Sections 2903.01, 2903.02, 2909.02, 2901.05(A) of the Revised Code of the State of Ohio which provides as follows:

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2903.02 Murder.

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2909.02 Aggravated arson.

(A) No person, by means of fire or explosion, shall knowingly:

(1) Create a substantial risk of serious physical harm to any person;

(2) Cause physical harm to any occupied structure.

(B) Whoever violates this section is guilty of aggravated arson, a felony of the first degree.

§ 2901.05 Burden and degree of proof.

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

(D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

STATEMENT OF THE CASE

On October 23, 1977, at 7:30 p.m., the Brunswick, Ohio, Fire Department responded to a fire at 101 Westchester Road in that community. After extinguishing the fire, they discovered four bodies within the wreckage. These were later identified as Donald Swihart, his wife Sue, and two of his sons, Brian and Russell. Further investigation revealed that arson was the cause of the blaze and that the propellant was gasoline (Tr. 134). As the tragedy unfolded, a telephone call was made to Miami University in Oxford, Ohio, to inform Michael, the Swihart's oldest son, of the events which had taken place (Tr. 269). After returning the call, Michael left Oxford accompanied by his floor advisor, Jerry Strand, to return to Brunswick (Tr. 270).

After extensive questioning, Michael confessed that he had, in fact, been the cause of both the fire and his

family's deaths (Tr. 226). At this time he drafted a written statement admitting that he had caused the deaths of his family with a baseball bat and had set the fire with gasoline (Tr. 232). He also consented to a tape recorded statement (State's Exhibit No. D).

Michael had come home for Fall break from Miami University on Thursday, October 20, 1977. The weekend was spent happily and continued so as Michael prepared to return to school. After Michael and his brother, Brian, ate dinner at approximately 4:30 p.m., he started to pack for the trip. As he got ready, he also wandered throughout the house, occasionally stopping to watch the television set with his father (Tr. 228). At one point, Michael came into the den to find his father swinging a baseball bat (Tr. 228). Mr. Swihart began to describe the World Series and how Reggie Jackson swung the bat. He then handed the bat to Michael and told him to try the swing (Tr. 228). At this point, Michael entered a state of deep concentration. First, he took short choppy swings attempting to copy Reggie Jackson. As Michael swung, his father continued to comment and offer suggestions. Gradually, Michael began to take fuller swings, oblivious to the fact that he was so close to his father. During this time Mr. Swihart was sharing his attention between his son and the television set. He was seated on the coffee table directly in front of the set and was leaning forward. Michael continued to take complete swings and on one swing his father straightened up and Michael felt the bat strike something (Tr. 228). As his father fell forward, Michael experienced what Dr. Stephen Zinn (head adolescent psychiatrist from the Hanna Pavillion of University Hospital in Cleveland, Ohio) described as a traumatic psychosis. Unable to deal with the fact that he had severely injured his father, Michael lapsed into a state of "psychic shock" (Tr. 410). Dr. Zinn testified that when Michael's

mother, Susan Swihart, entered the room and started screaming at him, his reasoning became so impaired that he could not distinguish between right and wrong nor could he control his actions (Tr. 408). From then on Michael remembers very little except that he apparently continued to swing the bat misperceiving his mother and brother Brian, as threats. At one point he remembers looking down, seeing the blood, throwing the bat away, and then running from the house (Tr. 229).

As Michael ran out of the house, he came upon his little brother, Russell, playing in the front yard with a neighborhood friend. Unsure of what to do next, and still laboring under the traumatic psychosis, Michael was certain of one thing, that he could not let his little brother, whom he dearly loved, see the bodies of the family (Tr. 247). Therefore, he decided to take his brother Russell for a drive to buy some gasoline for the car (Tr. 229). During the drive, Michael considered several courses of action. At one point he thought of running away with his brother. At another point he considered simply hiding him (Tr. 229). Still emotionally upset and laboring under the stress of the traumatic psychosis, Michael could come to no resolution as to how to cope with the preceding events. He returned to the house with Russell (Tr. 417). When they returned, he seized upon another way to keep Russell from going into the house. He suggested that they go buy gasoline for the lawnmower (Tr. 229). After procuring the gasoline on the second trip, Michael again could not reach a solution and returned home. When the car stopped, Russell quickly jumped out before Michael could stop him, and ran into the house to tell his parents that Michael had bought him candy. Michael ran to stop him, but was too late. He came upon his little brother in the family room staring at the bodies of his parents

and brother. Fearful that Russell would never forgive him or love him again, and still experiencing the stress of the former psychosis, Michael struck his little brother with the baseball bat (Tr. 230). At this point in time, Michael's reasoning was still impaired to the point where he could not refrain from his actions (Tr. 408). Russell fell to the floor and Michael tearfully cradled him in his arms for a few minutes.

Using the gasoline which he had just bought, Michael poured its contents throughout the living room and dining room. Lighting a match he let it burn down to his fingertips and then let it drop to the floor (Tr. 230). The force of the ensuing explosion catapulted him toward the door. Panic-stricken, he found himself outside the house, rushed to the car in the driveway, and drove back to school in Oxford, Ohio.

On November 7, 1977, Michael Swihart filed his plea of Not Guilty by Reason of Insanity. To support this claim, defense counsel acquired the services of a psychiatrist, Dr. Stephen Zinn, and a psychologist, Dr. James Mack.

A week before trial it was learned that Dr. Mack would be unable to attend the trial because his attendance was required at a professional conference. Whereupon, the defense filed a Motion for a Continuance citing the fact that Dr. Mack was a material witness instrumental to the plea of Not Guilty by Reason of Insanity. The trial court improvidently denied this motion and Petitioner asserted that they erred in so doing (pre-trial Record 104).

The panel consisting of Presiding Judge Neil Whitfield, the Honorable James V. Barbuto, and the Honorable Floyd Harris, heard the case starting on February 28, 1978, and after deliberation, found the defendant not guilty of the

murder of his father, Donald Swihart. However, they found Michael unanimously guilty of the murders of Susan Swihart and Brian Swihart pursuant to Ohio Revised Code §2903.01 (Tr. 585, 586). He was also found guilty of the aggravated murder of his brother, Russell, with specifications, pursuant to Ohio Revised Code §2903.01 (Tr. 586). The defendant was found guilty of aggravated arson pursuant to Ohio Revised Code §2909.02 (Tr. 585). The findings of guilty were against the manifest weight of the evidence in that the state had not proven its case beyond a reasonable doubt and Petitioner asserted this weakness to be reversible error. The uncontroverted testimony of Dr. Stephen Zinn indicated that the defendant was laboring under a traumtaic psychosis at the time of the killings caused by the accidental killing of his father, and that his reasoning was so impaired that he could not refrain from his actions (Tr. 410). The state presented a psychiatrist who admitted under cross-examination that he could not say that the defendant was able to refrain from the killing of his mother and brother, Brian (Tr. 566). In the face of such testimony, the panel, nevertheless, found the defendant guilty with the specification that he murdered his brother, Russell, to conceal the prior murders of his mother and brother, Brian.

Inasmuch as the recent rulings of the United States Supreme Court in *State v. Lockett*, 438 U.S. 586, 98 S. Ct. 2954 (1978) and *State v. Bell*, 438 U.S. 637, 98 S. Ct. 2977 (1978), declared the Ohio death penalty to be unconstitutional, the outcome of the mitigation hearing is moot. It is worthy to note, however, that the psychiatrist appointed by the state, for the penalty hearing, Dr. Robert Wangelin, stated unequivocally that the defendant was psychotic at the time of the final killing and indicated his belief that Russell's death was not perpetrated to escape detection (Mitigation Hearing Record 10).

The due process issues concerning the denial of a continuance and the failure of the state to prove its case beyond a reasonable doubt were raised as assignments of error to the Court of Appeals, Ninth Judicial District, State of Ohio (see Appendix, page A2) and again as Propositions of Law in the Memorandum in Support of Jurisdiction to the Supreme Court of Ohio.

ARGUMENT

QUESTION PRESENTED NO. I:

Whether the Denial of a Continuance for the Purpose of Securing an Expert Witness Essential to Establish the Petitioner's Plea of Not Guilty by Reason of Insanity Precluded the Petitioner From Preparing and Presenting an Adequate Defense and, Therefore, Violated the Petitioner's Due Process Rights Guaranteed Under the Fourteenth Amendment of the United States Constitution.

When the trial panel refused Petitioner's motion for a six-day continuance, they abused their inherent discretionary powers, and prejudiced Petitioner by foreclosing his use of a material expert witness essential to his plea of Not Guilty by Reason of Insanity. It is well established that in ruling on such a motion the trial court must look to the particular circumstances presented by each case. *State v. Barton*, 91 Ohio L. Abs. 57, 191 N.E.2d 173 (1961), and *State v. Reardon*, 28 Ohio Op. 2d 394, 201 N.E.2d 818 (1964). Furthermore, it is important to note that the federal standard comports with that of Ohio. *Johnson v. United States*, 291 F.2d 150 (8th Cir. 1961), and *Ungar v. Sarafite*, 376 U.S. 575, 11 L. Ed. 2d 921, 84 S. Ct. 841

(1964). If the need for a continuance is justifiable and the defendant would be prejudiced by the failure to grant it, then it is the duty of the court to grant the motion. *United States v. Collins*, 435 F.2d 698 (7th Cir. 1970). The attendant circumstances in the instant case require a finding that the continuance should have been granted. Dr. James Mack, Petitioner's material witness, was important in establishing Petitioner's plea of Not Guilty by Reason of Insanity. Prior to trial, Dr. Mack had examined Petitioner twice for a total of five hours. During this period, Dr. Mack conducted objective psychological testing, testing not performed by either the psychiatrist for the defense or the state. Therefore, his testimony was unique in that its conclusions were based on a methodology not utilized by any other professional who testified at the trial and was not cumulative or corroborative in nature, and Petitioner was prejudiced by its exclusion. Second, counsel for Petitioner also met the due diligence standard. *United States v. Uptain*, 531 F.2d 1281 (5th Cir. 1976). Counsel exhaustively prepared all potential evidence and testimony for the trial. Furthermore, counsel was quick to inform the court that Dr. Mack would be out of the country during the dates originally set aside for trial. Also, counsel filed an accompanying affidavit in support of their motion indicating that professional requirements precluded Dr. Mack from missing his conference. Third, the trial court's desire to expedite this case rather than assure Petitioner of a fair and impartial trial constitutes an abuse of judicial discretion. The general rule is that fairness, not expeditiousness, is the key factor in ruling on a motion to continue. *Ungar v. Sarafite, supra.* In the case at bar, remarks by the panel at the pre-trial motions hearing indicate that their main interest was speed, not due process.

The trial court abused its discretionary powers when it refused to grant Petitioner's Motion for a six-day continuance because they failed to use the proper standards in arriving at their conclusion.

When the court denied Petitioner's motion for a six-day continuance, they prevented a material expert witness, Dr. James Mack, from testifying in favor of the plea of Not Guilty by Reason of Insanity. This amounted to an abuse of judicial discretion. It is a well established principle of law in Ohio that a motion for a continuance is addressed to the sound discretion of the trial court, and that its actions are not reversible on error absent a clear showing from all of the relevant circumstances that there has been an abuse of discretion operating to the prejudice of the defendant. *State v. Barton, supra*; and *State v. Reardon, supra.* Federal courts have indicated that the determination of abuse of discretion must be made on a case-by-case basis. *United States v. Uptain, supra.* In keeping with this standard, one of the leading cases in this area, *Ungar v. Sarafite, supra,* stated:

> that in determining whether or not a denial of a continuance is arbitrary, the answer must be found in the circumstances of each case, particularly in the reasons presented to the judge.

This comports with the Ohio Revised Code §2945.02 which agrees that:

> no continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance.

Therefore, the situation must be attended by circumstances which call for a need to protect the defendant from po-

tential prejudice. Here, Petitioner was prejudiced due to the fact that in preventing Dr. Mack from testifying, the trial court precluded Petitioner from adequately representing himself.

The importance of Dr. Mack's presence was based upon the fact that as Petitioner's psychologist he spent extensive time examining him. If present, Dr. Mack would have testified to the results of various objective psychological tests, tests not conducted nor reported in the testimony of the other expert mental health witnesses. Consequently, this evidence would have been of a different nature than that of the psychiatrist's testimony and not merely cumulative to that offered by Dr. Zinn.

The issue of the cumulative nature of Dr. Mack's testimony is of particular import because the Appellate Court in its opinion found that Dr. Mack's testimony would have been cumulative based upon the content of his statements at the penalty-mitigation hearing (see Appendix, page A4)

The testimony at the mitigation hearing was limited to the purposes required by the statute and not intended to be substituted for what would have been presented in the body of the defense case. A more realistic interpretation of Dr. Mack's conclusions is that they were similar to those of Dr. Zinn. This similarity is critical in that these two men used entirely different systems of evaluation to ascertain their respective professional conclusions. Dr. Zinn employed the psychiatric model of evaluation which primarily relies upon the subjective impressions gathered from his interviewing of the client and others close to him. Dr. Mack's methodology included a more objective approach in that he administered a battery of psychological tests to the defendant and drew his conclusions from the results of those tests.

Both men utilized different techniques while producing similar results. Dr. Mack's exclusion from the case precluded the defendant from the full presentation of his case and interfered with the effective assistance of counsel in that attorneys were precluded from the competent exercise of their responsibilities. *Everitt v. U. S.*, 281 F.2d 429 (5th Cir. 1960).

The void which resulted from the absence of Dr. Mack's testimony was especially troublesome in that the state raised the issue of the subjective nature of Dr. Zinn's testimony during the trial while the objective complement to his testimony could not be presented.

> Q. (By Mr. Ingraham) And as I understand it, you gave no objective tests at the time of your examination; isn't that also correct? You gave no tests of such? You gave observational type tests?
>
> A. (By Dr. Zinn) That's right. (Tr. 486)

The void in testimony, created by the refusal to grant the continuance, takes on larger implications when viewed in terms of the fact that the state offered no evidence to contradict that of Dr. Zinn. Dr. Zinn's conclusions would have been objectively corroborated by Dr. Mack.

Finally, certain additional statements not previously discovered came to light at the pre-trial hearing. As the record indicates, Patrolman Dale Kozlic interrogated Petitioner on his return from Oxford. The crux of these statements was then transcribed by the patrolman (Pretrial Record 44, 45). Defense counsel were completely unaware that these statements had been made until February 28, 1978. Therefore, Dr. Mack's analysis, which had been completed prior to the pre-trial hearing did not include these statements. The question becomes whether

Petitioner's statements at that time were consistent with Dr. Mack's prior analysis of the defendant's state of mind. It was of paramount importance that Dr. Mack consider all relevant information to determine whether his analysis of Petitioner was consistent. This situation afforded the prosecution an unfair advantage because its psychiatric witness, Dr. Phillip Resnick, had access to these additional statements.

The denial of Petitioner's motion ignored the circumstances underlying its purpose. The trial court's decision was against the dictates of both state and federal case law. Both cite the importance of examining such motions on a case-by-case basis, with an eye to the particular circumstances. This approach tries to focus the attention of the court upon the factors of each case, and recognizes that these motions should not be foreclosed in a rote manner. The testimony to be offered by Dr. Mack was unique in its scope and conclusions. It went to the very heart of Petitioner's defense strategy and was testimony which defense counsel had diligently prepared and depended upon for use at trial. In a trial of such magnitude, to deny Petitioner the services of so important a witness, prejudiced him and precluded him from receiving a fair and impartial trial consistent with due process principles which require the presence of material witnesses and an adequate thorough defense. To be sure, a six-day continuance was not so unreasonable, that it warranted denying Petitioner a fair trial. Therefore, the trial court abused its discretion by denying Petitioner his motion for a six-day continuance, and ultimately prejudiced his presentation of a defense.

The appellate and trial courts' insistence that the problems caused by Dr. Mack's trip could have been alleviated by the use of a videotaped deposition are unrealistic. The

logistics of the situation made it impractical to attempt to tape Dr. Mack. Since defense counsel only learned of Dr. Mack's departure three days prior to making the motion for a continuance, it would have been difficult to adequately prepare equipment and questions on such short notice, even if taping had been practiced, the defense was correct in refusing to do so.

While the parties had exchanged psychiatric and psychological reports, the defense had developed strategies for the presentation of their information and case which they did not want to reveal to the state a week prior to trial and, in fact, wanted to present their expert witnesses after the state's case in chief.

This tactical decision combined with the incomplete discovery which was not discovered until the day of argument concerning the continuance makes the suggested use of the videotape deposition unreasonable and unfair.

The Petitioner was well within his rights when he declined the use of videotaping apparatus because he felt that it would be tactically unwise to do so. Videotaping is a voluntary device which a party may use, but certainly is not compelled to use. To be sure, Ohio Supreme Court Superintendence Rule No. 15 seeks to facilitate the smooth running of trials, particularly those in which expert testimony is required. However, use of this technique is strictly voluntary.

In the case at bar Petitioner did not desire to expose the thrust of Dr. Mack's testimony to the prosecutor one week before the trial. Since the state must prove defendant's sanity beyond a reasonable doubt, it would have been extremely advantageous for him to have a preview of defense counsel's strategy. In sum, Petitioner was well within his rights in denying the alternative of videotaping its witness.

The trial court erred when it refused Petitioner's motion because it sought to expedite the case rather than assure Petitioner that the proceeding was fair and impartial.

Remarks by the trial panel that a six-day continuance would cause great inconvenience, and that they would rather expedite the case, amounted to reversible error. The general rule is "that if a request for a delay in the date of trial is justifiable, then expeditiousness should not be the ruling determinant". *Ungar v. Sarafite, supra*; and *United States v. Collins, supra.* Since Petitioner's reasons for requesting the continuance are justifiable as demonstrated above, the panel's ill-chosen remarks indicate that they used an improper standard in denying the motion.

Petitioner filed his motion for the six-day continuance in order to assure the appearance and testimony of a material witness. Counsel for Petitioner has met all standards imposed upon them. The same cannot be said of the trial court. At the pre-trial hearing, Judge Whitfield amply portrayed the attitude of the panel:

> . . . and if I were trying this case by myself, or one of the other judges were trying it by themselves, it would probably be easy to afford you that, or afford you this sort of continuance. (Pre-trial Record 96)

and later,

> . . . now you ask the three of us to reschedule it. . . I don't know. I don't know when we can reschedule it. The case is getting old. This man has been incarcerated for a long time now, justice denied and all that sort of thing. (Pre-trial Record 97)

These remarks clearly indicate that the major concern of the panel was to complete the trial regardless of the detrimental effects to Petitioner.

The dictates of *Ungar v. Sarafite, supra,* and *United State v. Collins, supra,* are unequivocal. Clearing of the docket and expediting the case are not to be the principal concerns of the trial court. Rather, if a delay is justifiable, then the ends of justice require that the continuance be granted. Therefore, the panel erred when they indicated that their primary interest was in disposing the case rather than providing the Appellant with a fair forum.

The denial of the continuance violated the Petitioner's due process rights in that his effective presentation of his case was severely hampered and the lawyers could not present the evidence and witnesses that were required.

QUESTION PRESENTED NO. II:

Whether the Trial Court's Finding That the Petitioner Was Sane and Legally Responsible for the Killing of His Mother, Susan Swihart; His Brother, Brian Swihart; and Setting His Family's House on Fire; When Such Verdict Was Against the Manifest Weight of the Evidence and Where There Was Uncontradicted Evidence Clearly Indicating That the Petitioner Was Incapable of Refraining From His Acts, Violated the Petitioner's Due Process Rights Guaranteed Under the Fourteenth Amendment of the United States Constitution.

This issue revolves around the charges of murder lodged against the Petitioner for the deaths of his mother, Susan, and his brother, Brian. The state propounded the theory that Susan Swihart's death was caused by being beaten by a baseball bat. The same theory was contended with regard to Brian's death along with an alternative theory that Brian was killed by arson.

The legal argument around these deaths is essentially the same, with some additional elaboration concerning the state's alternative theory in Brian's death.

A guilty verdict is reversible if it is contrary to the weight of the evidence. *United States v. Conti,* 339 F.2d 10 (6th Cir. 1964). To be sustained, a guilty verdict must be supported by "substantial evidence" for every element of the crime charged. *State v. Callihan,* 11 Ohio App. 2d 23, 40 Ohio Op. 2d 73 (1967).

In the case at bar, the state failed to present any evidence rebutting the expert psychiatric testimony of Dr. Stephen Zinn, Petitioner's witness, that Petitioner was "psychotic" and incapable of refraining from his conduct in killing Susan Swihart. Dr. Zinn, one of only two psychiatrists permitted to testify, unequivocally testified that during the time of Mrs. Swihart's killing, Petitioner was in a state of "psychic shock" so severe that Petitioner was neither capable of knowing right from wrong nor avoiding his acts (Tr. 409, 410). Dr. Zinn testified that he could make this diagnosis definitely and unqualifiedly (Tr. 407). The state failed to contradict this testimony when it presented its own psychiatric witness, Dr. Phillip Resnick, who twice conceded he could not offer an opinion about Petitioner's state of mind during the time in question (Tr. 548, 566).

Dr. Zinn's testimony diagnosed a clear case of legal insanity as defined by Ohio law. Insanity is defined as an incapability either of knowing right or wrong or of refraining from the wrong even if known. *State v. Humphries,* 51 Ohio St. 2d 95, 5 Ohio Op. 3d 89, 364 N.E.2d 1354 (1977); *State v. Anders,* 29 Ohio St. 2d 1, 277 N.E.2d 554 (1972); *State v. Staten,* 25 Ohio St. 2d 107, 54 Ohio Op. 2d 235, 267 N.E.2d 122 (1971). The witness painstakingly explained his diagnosis of Petitioner's "psychosis" as a

specific category of a broader type of mental illness medically termed "adolescent adjustment reaction" in the AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC MANUAL (Tr. 408):

> Witness: My feeling was that (Petitioner) was psychotic at that time, that the best way to describe his psychosis at that time, again trying to be more specific, going from this broad diagnosis to a more specific description of what (Petitioner) experienced at that time would be one of traumatic psychosis, and that is, (Petitioner) was in a state of psychic shock. He had just experienced an overwhelming stress to his psychic functioning and apparatus and was in a state of traumatic psychosis. (Tr. 410, 411)

Dr. Zinn further testified explicitly:

> Question: All right, at that point in time was (Petitioner's) reason so impaired that he was incapable of recognizing right from wrong?
>
> Witness: Yes sir. (Tr. 409)

The state failed to contradict this evidence when it offered the testimony of Dr. Resnick who twice confessed his inability to state an opinion about Petitioner's insanity during that time when Mrs. Swihart and Brian were killed. On cross-examination, Dr. Resnick was asked if he could indicate that Petitioner was sane:

> Question: Okay. But then in your report you talk about Sue Ellen Swihart and Brian Swihart. And you can't indicate, can you, doctor, that Michael could refrain from what he did at that time?
>
> Answer: No. I don't know for those next two killings whether he could have refrained or not. (Tr. 548)

Then again, in response to direct questioning by Judge Harris, Dr. Resnick was asked:

> Question: Would you review the state of mind of the defendant at the time of striking mother and older brother?
>
> Answer: Yes, I think that . . . I don't know what caused him to hit his father. Once that happened, whether it was accidental or not, I think that there was a severe emotional reaction where there was some loss of normal controls, and the striking and hitting of the other two I think was in some altered state of consciousness. *I don't know if he could have refrained or not. But that's a real question.* [Emphasis added] (Tr. 566)

The entirety of the psychiatric testimony offered at trial thus constitutes clear and unequivocal evidence that Petitioner was insane according to the legal definition of that term under Ohio law. This evidence stands uncontradicted by the state's own psychiatric witness. Moreover, the psychiatric testimony was the only evidence presented which bore upon Petitioner's state of mind during the time of Mrs. Swihart's and Brian's deaths. The only other evidence even remotely material to Petitioner's mental state at this time was the state's showing that Petitioner had not previously exhibited signs of mental disorder. But such evidence merely served to corroborate the defense's theory of Petitioner's traumatic psychosis as caused by the sudden and accidental killing of Petitioner's father, triggering the Petitioner's uncontrollable reaction. The state's evidence of Petitioner's prior mental normalcy was merely circumstantial evidence bearing only collaterally upon Petitioner's insanity during the crucial time in ques-

tion. Such circumstantial evidence cannot support a conviction unless it is irreconcilable with any reasonable theory of a defendant's innocence. *State v. Kulig*, 37 Ohio St. 2d 157, 66 Ohio Op. 2d 351, 309 N.E.2d 897 (1974). In the instant case, the state's circumstantial evidence concerning Petitioner's absence of prior mental illness was not merely reconcilable but substantiated Petitioner's theory of insanity.

The Appellate Court missed these points when it, too, searched for evidence of prior mental illiness in the Petitioner (Opinion, page 5). Past and future mental illness were irrelevant to the argument presented. The insanity defense does not require historic manifestations of mental illness in the defendant in order to be valid. It only relates to the state of mind of the defendant at the time of the conduct in question.

The Appellate Court (Opinion, page 5) did recognize that the state did not present evidence that the defendant could have refrained from the killing of his mother and brother. It also recognized that this contention had been presented through the testimony of Dr. Zinn by the defense.

Considering the evidence before it, the trial court had no alternative but to decide the issue on the evidence before it. A lack of evidence concerning prior mental health problems could not be used to contradict the defense evidence.

The court in *Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct. 1930 (1978), reiterated this point in discussing the requirement for an instruction of presumption of innocence. The court ruled that the trier of fact must rely on the evidence before it in making its determination and that to do otherwise would be a due process violation.

In ignoring the uncontradicted evidence presented by the defense, the trial court violated the due process rights of the defendant and violated the weight of the evidence standard for evaluating the validity of guilty verdicts.

The state likewise failed to present any evidence showing Petitioner's purpose or intent to kill Brian Swihart when it advanced its alternative theory that Petitioner murdered the victim by arson.

Proof of killing without the requisite showing of purpose or intent to kill does not establish the crime of murder. *State v. Poole*, 33 Ohio St. 2d 18, 62 Ohio Op. 2d 340, 294 N.E.2d 888 (1973). Murder as defined by the Ohio Revised Code §2903.02 requires the element of purpose or intent to kill. If a statute defining an offense requires that it be committed with a particular intent, such intent becomes a material element of the offense which must be independently proven beyond a reasonable doubt. *State v. Huffman*, 131 Ohio St. 27, 5 Ohio Op. 325 (1936).

In the case at bar, the only evidence bearing directly upon Petitioner's state of mind when he set the fire indicated his belief that the victims were already dead (Tr. 430). Therefore, Petitioner could not have any intent to kill acting under such a belief. The state could not present a shred of evidence challenging the reasonableness or sincerity of that belief. In fact, the evidence revealed that at least three of the four victims were already dead when the fire started (Tr. 190), while the evidence about Brian's vital condition at this time was contested. Indeed, the state's second alternative theory of the fire, evidenced throughout the trial, was that Petitioner's act of arson was to "cover up" the killings which had already occurred rather than committed with any intent to kill. (Tr. 452, 572).

Petitioner was not on trial for negligently or recklessly killing Brian Swihart, Petitioner was tried for a purposeful killing, for which proof of an intent to kill must be independently shown beyond a reasonable doubt. The state not only failed to show intent, it presented its entire case inconsistently theorizing that Petitioner set the fire to conceal antecedent killings, not to kill.

Therefore, even accepting the state's alternative theory that Petitioner murdered Brian Swihart by arson, the state's case was based merely on speculation, and remained totally unsubstantiated by any evidence showing a purpose to kill.

Whether Brian Swihart's death was caused by injuries to the head inflicted when Petitioner struck both Susan and Brian Swihart or whether his death was caused by fire, the state failed in either case to prove murder. Assuming the former, the uncontradicted evidence established that Petitioner was then insane; assuming the latter, the state failed to present *any* evidence indicating Petitioner's purpose to kill in committing arson.

The verdicts, therefore, violated the concepts enunciated in *In Re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), that the state has the burden to prove every element of the offense alleged beyond a reasonable doubt.

The case of *United States v. Burks*, 547 F.2d 968 (6th Cir. 1976) is quite analogous to the instant one. In *Burks, supra*, the defense contended that due to his mental state, Burks was unable to conform his conduct to the requirements of the law he was charged with violating. *Burks, supra*, at 969.

Through psychiatric testimony, this contention was made. The government presented one expert witness who

under cross-examination could not rebut the theories posited by the defense. The government also presented lay witnesses who testified that in their opinion the defendant had not appeared abnormal in their past dealings with them.

The court found that the testimony of the lay witnesses did not establish sufficient proof as to the mental health of Burks at the time of the act. Since the government had not presented psychiatric testimony which actually contradicted the defense claims that Burks could not form the requisite mens rea for the alleged offense, the conviction was voided.

In the case at bar Michael Swihart presented expert psychiatric evidence to establish that at the time of his mother and brother, Brian's deaths, he could not refrain from his actions. The lay witnesses presented by the state to indicate Michael's previous health had no contradictory bearing on the defense theory. The state's psychiatrist would not say that Michael could have refrained from killing his mother and brother, Brian.

In order to be culpable for the charge of murder as defined under Ohio Statute, Michael's acts would have had to be knowing and intentional. The *only* evidence presented to the issue of sanity claimed that Michael was out of control as a result of the shock of accidentally killing his father. (The Petitioner was charged with the murder of his father but the trial court found that death to be accidental.) In the absence of evidence to the contrary, the defense contention of insanity at the time of the killing of Susan Swihart and Brian Swihart should have prevailed. The essential elements of the offense, "murder", were not proven beyond a reasonable doubt by the state.

QUESTION PRESENTED NO. III:

Whether the Trial Court's Verdict That Petitioner Was Guilty of the Aggravated Murder of Russell Swihart, When Such Verdict Was Against the Weight of the Evidence, First Because the Evidence Presented Respecting Petitioner's Insanity Could Not Support a Conviction, and Second, Because the Evidence Failed to Show That Petitioner Acted With Prior Calculation and Design As Charged in the Indictment Violated the Petitioner's Due Process Rights.

The trial court's verdict that Petitioner committed aggravated murder with prior calculation and design in killing Russell Swihart (Case No. 5962) is against the weight of the evidence in two respects. First, the evidence bearing on Petitioner's mental condition during this offense could not lawfully warrant a conviction reached beyond a reasonable doubt. Furthermore, the state's evidence concerning the alleged prior calculation and design was entirely circumstantial and could not prevail over compelling evidence that Petitioner acted in uncontrollable impulse under extreme emotional stress.

The trial court's verdict respecting Petitioner's pleaded insanity is against the weight of evidence where the nature of the evidence offered at trial could not sustain a conviction beyond a reasonable doubt.

In determining whether a verdict is against the weight of the evidence, a reviewing court should consider the degree of proof required in a criminal case. *Sinatra v. State,* 17 Ohio L. Abs. 481 (1934); *State v. Lippi,* 116 Ohio App. 123, 21 Ohio Op. 2d 432 (1962). Although a reviewing court should not consider evidence anew, it is, nevertheless, bound to inquire if the record will support a finding of guilty beyond a reasonable doubt as a matter of law. *State v. Wolery,* 46 Ohio St. 2d 316, 75 Ohio Op. 2d 366 (1976). Such evidence must be found by an appellate court "to attain that high degree of probative force and certainty which the law demands to support a conviction". *State v. Clark,* 92 Ohio App. 382, 49 Ohio Op. 437 (1952).

In the case at bar, the evidence bearing directly on Petitioner's insanity in Russell Swihart's killing consisted of the conflicting testimony of the state's witness, Dr. Resnick, and the Petitioner's witness, Dr. Zinn. Dr. Zinn testified that he diagnosed Petitioner as psychotic and incapable of refraining from striking Russell Swihart (Tr. 517, 518). In fact, he testified further that Petitioner's ability to refrain from striking Russell was so impaired that he probably would have behaved the same way even if a policeman were standing at Russell's side (Tr. 511, 512, 517). Dr. Resnick's testimony was contrary.

The only evidence presented concerning Petitioner's mental condition during this time thus stood in contrapose. So standing, the evidence did not "attain that high degree of probative force and certainty required of guilty verdicts". Reasonable minds confronted with such evidence in the instant case could not dispel a reasonable doubt as to Petitioner's pleaded insanity. The Appellate Court felt that Dr. Zinn's testimony with regard to Russell Swihart's death was based on the "self-serving" confession of the defendant (Opinion, page 7). It is important to note that Dr. Zinn had training in the criminal justice system during which time he learned to identify self-motivated exaggeration or deception. Dr. Zinn felt that no such actual deception was taking place in the statements of the defendant.

This court's reversal of the trial court's verdict would fulfill the proper function of a reviewing court by rejecting a verdict which is not supported by the quantum of proof required. The guilty verdict of aggravated murder should be reversed as against the weight of the evidence if only because the state failed to prove Petitioner's sanity beyond a reasonable doubt.

The trial court's verdict that Petitioner's killing of Russell Swihart constituted aggravated murder with prior calculation and design should not have been sustained because the state presented only circumstantial evidence which did not refute compelling evidence that Petitioner acted impulsively and under stress.

When the state chose to charge the Petitioner with aggravated murder in the death of his younger brother, Russell, it assumed a burden to prove more elements than in the lesser charge of murder.

The Ohio Revised Code §2929.01(A) defining aggravated murder with prior calculation and design sets up a more demanding standard than the previous Ohio first degree murder statute. Aggravated murder requires a studied analysis, a pre-formed scheme or plan by which the means to kill have been calculated. *State v. Jenkins*, 48 Ohio App. 2d 99 (1976). A momentary deliberation or bare premeditation is insufficient to establish aggravated murder. *State v. Jenkins, supra; State v. Toth*, 52 Ohio St. 2d 206, 6 Ohio Op. 2d 461, 371 N.E.2d 831 (1977). As a material element of the offense prior calculation and design is a separate issue which must be independently proven beyond a reasonable doubt.

It is well settled that where circumstantial evidence alone is relied upon to prove an element essential to conviction "it must be consistent only with the theory of guilt,

and irreconcilable with any reasonable theory of the accused's innocence". *State v. Kulig*, 37 Ohio St. 2d 157, 66 Ohio Op. 2d 351, 309 N.E.2d 897 (1974).

In the instant case, the state's proof of Petitioner's prior calculation and design amounted to no more than speculation piled on surmise. The state offered absolutely no evidence showing any prior calculation to kill Russell Swihart. Instead, the state offered evidence to show that a plan existed to burn the house. But such evidence did not and could not carry the state's burden to prove that Petitioner had a pre-formed scheme to kill the victim with a baseball bat, nor was the evidence of a plan to commit arson irreconcilable with Petitioner's own evidence showing that Russell's killing occurred in a moment of sudden excitement.

The Petitioner presented persuasive evidence showing that he acted impulsively, in a state of panic, in striking Russell (Tr. 511, 512). *The state's only witness to the Petitioner's state of mind, the state's psychiatrist, openly conceded that he could not state that Petitioner killed according to a plan or from premeditation* (Tr. 558, 559). Petitioner's witness, Dr. Zinn, testified that Petitioner labored under a psychosis rendering him incapable of planning ahead:

> Question: Doctor, if you would, describe the state of Michael Swihart during the period of time that he was buying the gas, that he was taking his brother Russell up to get the candy, the state of mind of Michael when he was taking Russell to buy these various items.
>
> Answer: His state of mind, as he described it, was an inability to put together several logical steps of thought so that he could make a decision; that

is, he was flooded with several different things at the same time. He loved Russell, he wanted to protect him but, on the other hand, he was driving the car, where he was going to go and how far he would go, and would he just keep driving, would he stop somewhere, but he loved Russell, what just happened, did he really do that, did he really kill parents and Brian. In other words, his mind was being impinged with many different things and there was inability to sort that out and organize, unable to reach a logical plan, a course of action, where to go at that point.

Question: In other words, this traumatic psychosis goes up and down according to the stress level, correct?

Answer: Yes.

Question: Now, doctor, referring to the story, could we get to the point in time in which Russell enters the home and Michael is close behind him? At that period in time, can you give us a diagnosis as to Michael's state of mind?

Answer: It would continue to be traumatic psychosis. Although, as the diagnostic category read it would be lessened. But there is still—there still would be an inability to think several steps ahead in order to plan. For instance, an inability to think ahead, what's going to happen when we stop the car if Russell jumps out. Instead, Michael describes thinking about how he can get Russell to go off in the woods, how he can get Russell to get away.

Question: Now, let me move to the point in time when both Michael and Russell are standing in the living room; have you reached a diagnosis as to the

state of mind at that time? The family room, I'm sorry.

Answer: Yes. I have.

Question: And what is that diagnosis?

Answer: I feel at that time he had a traumatic psychosis.

Question: Now, is this the same traumatic psychosis that he was experiencing while buying these various items?

Answer: Yes. It was.

Question: Now doctor, is this a recognized mental illness?

Answer: Yes. It is.

Question: And is it a defect or a disease of the mind?

Answer: Yes. It is.

Question: Does it have the potential to impair one's reason?

Answer: Yes. It does.

Question: And was that reason impaired at that particular time?

Answer: As to my judgment, it was.

Question: Was that reason so impaired that at that time he could not refrain from his actions?

Answer: That is my opinion.

Question: And it is—is your opinion based upon a reasonable medical certainty?

Answer: Yes. (Tr. 416-419)

Petitioner thus not only offered a reasonable theory of his own innocence of the charged prior calculation and design but presented psychiatric testimony substantiating his theory. In doing so, Petitioner fulfilled the requirement of *State v. Kulig, supra,* that the accused's theory of his innocence be plausible.

The state, however, did not meet its burden of proof under *Kulig* because its evidence of Petitioner's prior calculation was entirely circumstantial, unsupported by the state's psychiatrist (Tr. 558, 559), tending to show merely that Petitioner had formed a plan to burn the Swihart house, and because it was reconcilable with Petitioner's defense that the killing was not part of the plan to commit arson. The state psychiatrist disagreed with the defense psychiatrist by claiming that the Petitioner could have refrained from killing his youngest brother when the child discovered the bodies of the other family members. However, the state's witness specifically would not say that the Petitioner could form the design or premeditation necessary to be guilty of aggravated murder. He was unable to conclude that the Petitioner could have had the requisite mental state to be culpable of violating the Ohio Aggravated Murder statute. Consequently, the defense claim that the Petitioner was unable to premeditate went unrebutted, as did the other defense claim that the Petitioner lacked the requisite mental state for culpability for the murder charges. *Kulig* requires that circumstantial evidence sufficient to convict must be *irreconcilable with any* theory of the accused's innocence. The state's evidence showing Petitioner's plan to burn the house is not merely reconcilable with Petitioner's own account but, in fact, corroborates his story.

The state's circumstantial evidence fails to displace Petitioner's theory of his innocence. Therefore, in accordance with *Kulig,* the state's circumstantial evidence was *per se* insufficient to convict, and the trial court's verdict on the charge of aggravated murder should be reversed.

CONCLUSION AND PRAYER

In each of the charges against the Petitioner, the state neglected to rebut psychiatric testimony which asserted that the Petitioner was unable to form the requisite intent. With regard to the murder charges, the state presented no evidence in contradiction to the theory of the defense.

With regard to the aggravated murder charge, the state did present psychiatric testimony which alleged that Michael could have refrained from the act of killing his youngest brother. The Petitioner contends that in the framework of the total evidence, this testimony should not be construed as sufficiently persuasive as to uphold the verdict.

This position is especially valid because one culpable of aggravated murder must be able to do more than control himself, he must be able to predetermine a design to commit an act, and the state psychiatrist did not and could not refute the defense contention that the Petitioner was unable to premeditate his acts at the time in question.

The state's failure to rebut the critical aspects of the defense meant that the state failed to uphold its burden of proof as required by *In Re Winship, supra*; *Mullaney v. Wilbur,* 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975) and *Patterson v. New York,* 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).

To maintain the integrity of the right to be deemed innocent until proven guilty beyond a reasonable doubt, it is essential that these convictions be set aside.

Wherefore, Petitioner prays that Certiorari be granted in the within matter.

Respectfully submitted,

JAMES W. BURKE, JR.

and

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated May 25, 1979)

No. 79-246

THE SUPREME COURT OF OHIO
THE STATE OF OHIO
CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,
vs.
MICHAEL SWIHART,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR MEDINA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Medina County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS OF SUMMIT COUNTY, OHIO

(Dated December 20, 1978)

C.A. No. 807

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) ss:
MEDINA COUNTY)

STATE OF OHIO,
Plaintiff-Appellee,

v.

MICHAEL W. SWIHART,
Defendant-Appellant.

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT, SUMMIT COUNTY, OHIO, CASE No. 77 CR 0250

DECISION AND JOURNAL ENTRY

This cause was heard October 20, 1978, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

MAHONEY, *P.J.*

Michael W. Swihart appeals his conviction and sentence to death by a three judge panel for the aggravated murder with specifications of his brother, Russell, and

for the murders of his mother, Susan and brother, Brian, and for aggravated arson. He was acquitted of a charge of murder of his father, Donald Swihart. We modify.

FACTS

On Sunday night, October 23, 1977, the charred remains of Donald Swihart, his wife Sue, and their sons Brian (16) and Russell (9) were recovered from the explosion and fire which engulfed their home in Brunswick. The next morning the defendant, Michael W. Swihart, 19 year old son and brother respectively, returned home from Miami University and gave the following handwritten confession to the police.

> "We were watching T.V. and my father was swinging a baseball bat. He put the bat down and I picked it up and started swinging it. He was leaning over watching T.V. and he straightened up and I hit him and he fell down. My mother screamed and ran to me and I kept swinging and Brian came and I kept swinging. Russell was outside and I didn't want him to know what I had done so I took him to buy some candy and then again to buy some gas. But he ran inside and I had to hit him easy. He fell down. Then I don't know I lit a match and stood there and everything was on fire. Then something exploded and blew me to the door. I ran outside and drove away to the Colesium. [sic]"

The defendant entered a plea of not guilty by reason of insanity. Psychiatric testimony was offered by the state after the defense put forth psychiatric evidence on the affirmative defense. Neither side offered any evidence of any mental illness or psychosis prior to October 23. The defendant did not testify. The trial court overruled pre-trial motions to suppress written, oral and taped, confessions and statements of the defendant.

ASSIGNMENT OF ERROR I

"The trial court erred in refusing to grant a six-day continuance sought prior to the trial for the purpose of securing the presence of a material witness essential to establish appellant's plea of not guilty by reason of insanity, which prejudiced appellant by precluding him from preparing an adequate defense, and impairing his right to present evidence in his favor."

Defense counsel retained the services of Dr. Stephen Zinn, a psychiatrist. Dr. Zinn suggested that counsel have psychological testing done on the defendant by Dr. James Mack, Ph. D. Dr. Mack performed the tests and submitted a report to Dr. Zinn. The defense contemplated Dr. Mack's testimony and presence at the trial. The trial was scheduled for February 28 and Dr. Mack informed defense counsel on February 13 that it was necessary that he be in Mexico on that day. On February 17, defense counsel filed a motion, supported by affidavit and memorandum, requesting a continuance of six days so that Dr. Mack would be available. On February 23 the court heard and overruled the motion for a continuance.

We hold that the trial court did not abuse its discretion in refusing to grant the continuance. The transcript of proceedings indicates that the defense could have utilized typed or video-tape depositions but did not choose to do so as a matter of trial tactics and strategy. Additionally, the parties had already exchanged psychiatric and psychological reports prior to trial. The transcript further reveals that Dr. Zinn had Dr. Mack's report available to him but did not utilize it in reaching his diagnosis. We note that Dr. Mack testified at the mitigation hearing. His testimony would have been cumulative to that of Dr. Zinn.

ASSIGNMENTS OF ERROR II AND III

"II. The trial court's finding that appellant was sane and legally responsible for the killing of Susan Swihart is against the weight of the evidence where uncontradicted evidence clearly indicated that appellant was psychotic and incapable of refraining from his acts.

"III. The trial court's verdict that appellant is guilty of the murder of Brian Swihart is against the weight of the evidence where the state failed to present any evidence of appellant's sanity and failed moreover to contradict expert testimony that he was insane."

The transcript of proceedings does not support the allegations in these two assignments of error that the defense testimony of insanity was uncontradicted and that the state did not offer any evidence of sanity.

The defense testimony was substantially that Michael was in a deep state of concentration as he was practicing swinging the bat. When he accidentally struck his father, he suffered a psychic shock and went into a state of traumatic psychosis and his thought processes became disassociative. He then could not refrain from striking his mother and brother when his mother came in the room screaming at him and his brother tried to restrain him. He was undergoing an adolescent adjustment reaction. Dr. Zinn felt Michael was legally insane and not responsible from that point through the time of driving to the Coliseum.

On the other hand, the state offered uncontroverted evidence that no mental disease of psychosis of any kind existed prior to the striking of Michael's father. Dr. Resnick, who testified on behalf of the state, stated that he could not given an opinion on whether Michael could have refrained from doing what he did to his mother and brother, Brian.

The burden was upon the state to establish each element of the crime of murder as to Mrs. Swihart and Brian beyond a reasonable doubt. This would include the requisite degree of intent or culpability; see, *State v. Chase*, 55 Ohio St. 2d 237 (1978); *State v. Humphries*, 51 Ohio St. 2d 95 (1977); and *State v. Robinson*, 47 Ohio St. 2d 103 (1976). This was a question of fact for the three judge panel. The panel had a right to accept or reject Dr. Zinn's opinion. See, *State v. Zimmerman*, Summit No. 7021 (9th Dist. Ct. App., February 7, 1973) and *State v. Toothman*, Summit No. 7798 (9th Dist. Ct. App., December 10, 1975). The panel chose not to believe Dr. Zinn's testimony and believed that the absence of psychosis or disease continued as it had prior to the striking of the father.

ASSIGNMENTS OF ERROR IV AND V

"IV. The trial court's verdict that appellant is guilty of the specification of killing Russell Swihart to escape detection of the murders of Brian and Susan Swihart is against the weight of the evidence where the state failed to present evidence establishing appellant's sanity for the predicate murders charged.

"V. The trial court's verdict that appellant is guilty of the aggravated murder of Russell Swihart is against the weight of the evidence, first because the evidence presented respecting appellant's insanity could not support a conviction, and second because the evidence failed to show that appellant acted with prior calculation and design as charged in the indictment."

The defense psychiatric testimony on these questions was to the effect that the defendant's psychosis continued through the killing of Russell and the setting of the fire.

The state's psychiatric testimony was that as to Russell, the defendant acted normally with goal-oriented and directed behavior. The defendant's confession shows that he twice took Russell with him to get gas for the car and to get his thoughts together on what he should do. He bought Russell gum and candy. He told Russell he made the second trip for gas for the "lawnmower." He followed after Russell when he ran into the house. He struck Russell with the same baseball bat. He deliberately set the fire.

The evidence was such that the panel could properly find beyond a reasonable doubt that the defendant acted with prior calculation and design in killing Russell and setting the fire to escape detection for what he had done. The panel chose not to believe the self-serving motivations and explanation set forth in his confessions and statements and/or as related to Dr. Zinn.

SUMMARY

We overrule all five assignments of error. We find sufficient credible, probative, and reliable evidence for the trial panel to find the defendant guilty of the murders of his mother and brother Brian, and guilty of aggravated arson, and guilty of aggravated murder with specifications as to his brother, Russell.

Defendant's counsel raised the issue of the sentence in the light of *Ohio v. Lockett*, ... U.S. ....., 57 L. Ed. 2d 973 (1978). This case was decided by the United States Supreme Court subsequent to the sentencing in this case. That court found R.C. 2929.04 unconstitutional as it applies to capital punishment.

Accordingly, we hereby modify the defendant's sentence on the aggravated murder of his brother, Russell

Swihart, from death in the electric chair to life imprisonment as provided in R.C. 2929.02.

Therefore, as modified herein, we affirm the judgments of conviction and sentence.

The court finds that there were reasonable grounds for this appeal.

We order a special mandate, directing the Medina County Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/s/ EDWARD J. MAHONEY
Presiding Judge

HUNSICKER, J., BRENNEMAN, J., Concur